

REMARKS

This Response is submitted in reply to the final Office Action mailed on October 5, 2010. A petition for a one month extension of time is submitted herewith this Response. The Commissioner is hereby authorized to charge \$130.00 for the petition for a one month extension of time and any additional fees which may be required or credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3712036-00497 on the account statement.

Claims 1-9 and 11-16 are pending in this application. Claim 10 was previously canceled without prejudice or disclaimer. In the Office Action, Claims 1-9, and 11-16 are rejected under 35 U.S.C. §103. For the reasons set forth below, Applicants respectfully traverse the rejections and submit that the rejections should be reconsidered and withdrawn.

In the Office Action, Claims 1-4, 9, 12 and 14-16 are rejected under 35 U.S.C. §103(a) as being unpatentable over WO 9730600 to Riviere et al., wherein U.S. Patent No. 6,558,729 to Riviere et al. ("*Riviere*") is relied on as an English translation of WO 9730600, in view of U.S. Patent no. 3,677,443 to Smadar et al. ("*Smadar*"), U.S. Patent No. 2,294,172 to Getz ("*Getz*"), U.S. Patent No. 4,346,120 to Morley et al. ("*Morley*"), and further in view of EP 0509967 to Packaging Technology, Ciabatti ("*Ciabatti*"), EP 1061006 to Clauwert ("*Clauwert*"), U.S. Patent No. 3,827,607 to Schultz ("*Schultz*"), U.S. Patent No. 5,698,247 to Hall ("*Hall*"), U.S. Patent No. 6,379,736 to Destephano ("*Destephano*"), U.S. Patent No. 5,633,029 to Cox et al. ("*Cox*"), and in further view of U.S. Patent No. 3,969,531 to Cornelius ("*Cornelius*"). Applicants respectfully disagree with and traverse this rejection for at least the reasons set forth below.

Independent Claims 1 and 16 recite, in part, methods comprising placing a frozen dessert in a first compartment of a rigid receptacle equipped with a dispensing member and a piston that divides the receptacle into the first compartment and a second compartment, then, after having put the dispensing member in a closed position, pressurizing the rigid receptacle by injecting a propellant gas into the second compartment of the rigid receptacle to a pressure great enough to ensure dispensing, given the consistency of the frozen dessert to be dispensed and characteristics of the dispensing member, the method comprising using a propellant gas in the second compartment which is virtually insoluble in the product to be dispensed, and using an expansion gas in the first compartment which is different from the propellant gas and highly soluble in the frozen dessert to be dispensed in order to expand the frozen dessert when it is dispensed.

Applicants have found that it is possible to package a thick but malleable frozen dessert in a pressurized receptacle with a high enough pressure given the viscosity of the product. Applicants have also found that it is also possible to choose the degree to which the product is expanded at the output of the pressurized receptacle independently of the pressure required for propulsion of the product from the receptacle and of the speed at which the product comes out of the receptacle. See, specification, page 4, lines 13-19. These advantages are achieved, in part, by providing two different gases for dispensing, the product, one of which has the propulsion function and the other the expansion function. Each gas is contained in a separate chamber of a container. The propellant gas is virtually insoluble in the product to be dispensed when in the liquid state while the expansion gas is highly soluble in the said liquid product. The expansion of the dispensed product will then be dependent on the amount and on the solubility of the expansion gas introduced into the receptacle, while the ejection of the product will depend on the pressure of the propellant gas introduced into the receptacle. In contrast, Applicants respectfully submit that the skilled artisan would have no reason to combine the cited references to arrive at the present claims.

For example, Applicants respectfully submit that the cited references are directed to unrelated products that have completely different objectives. *Rivier*, *Morley*, *Hall*, *Destephano*, and *Cox* are all directed to food products and fail to even suggest rigid receptacle having first and second compartments with a different gas injected into each compartment. Instead, *Riviere* is entirely directed toward a frozen dessert that is spoonable at freezing temperatures without the necessity of the product being expanded by the incorporation of gas or passing through a nozzle under pressure into a container in which the product is packaged under pressure. See, *Riviere*, Abstract; column 3, lines 32-38. *Morely* is entirely directed toward frozen food products that emulate the features of soft serve ice cream but at such lower temperatures as to be suitable for prolonged storage in store and home freezers. See, *Morely*, column 1, lines 5-11. *Hall* is entirely directed to process for the manufacture of a frozen spoonable water-ice comprising producing ice flakes, grinding the ice flakes into spherical granules, mixing the granules with a flavored slurry and packaging the mixture. See, *Hall*, Abstract. *Destephano* is entirely directed toward a dairy-based gelato composition that includes an amount of solids, a sugar source, and a fat source and retains a texture characteristic of freshly-made gelato. See, *Destephano*, Abstract. *Cox* is entirely directed to a suspension of very small ice crystals in a sugar solution that involves

cooling the solution to a temperature from just about the metastable limit temperature of the solution to just above the melting point of the solution. See, *Cox*, Abstract.

Smadar, is entirely directed toward a non-dairy food product having a texture and eating characteristics of soft-serve ice cream that can be dispensed from a self-refrigerating dispenser containing a refrigerant under pressure and in a liquid state. See, *Smadar*, Abstract; column 3, lines 61-69. *Smadar* discloses an apparatus for dispensing frozen comestibles having a dispensing unit 10 that is divided into two chambers – a lower chamber 26 and an upper chamber 28. The lower chamber serves as a housing for a bag 12 containing a liquid product, the bag is surrounded by a compressed liquid refrigerant. The lower chamber is connected to the upper chamber by a valve system allowing the liquid refrigerant to vent from the lower chamber into the upper chamber and to expand, thereby cooling the product which is at the same time led from the bag 12 toward a dispensing nozzle through a conduit. The compressed liquid refrigerant squeezes the product from the bag into the conduit and serves as a propellant. Whether the propellant is soluble or not does not matter since it will never be in contact with the product and only acts on the bag as a propellant and on the conduit as a refrigerant.

Further, *Smadar* merely suggests the alternate use of edible propellant which may be added to the product bag and which will not only serve as a propellant but also aerate the mix. However, it is expressly mentioned that “where a propellant gas is incorporated within the product, additional refrigerant pressure for the purpose of dispensing the product is unnecessary.” See, *Smadar*, column 4, lines 62-64. Thus, *Smadar* does not disclose the use of an insoluble propellant gas and a soluble expansion gas, let alone the use of the gases in separate compartments of a receptacle. Instead, *Smadar* merely discloses the use of one soluble gas for propelling and expansion or the use of a gas for refrigerating and dispensing. See, *Smadar*, column 4, lines 47-64. Accordingly, at no place in the disclosure does *Smadar* disclose or suggest methods for packaging a frozen dessert in a rigid receptacle having a piston dividing the receptacle into first and second compartments wherein the first compartment comprises an expansion gas and the second compartment comprises the propellant gas.

Getz, *Ciabatti*, *Clauwert*, *Scheindel*, *Schultz*, and *Cornelius* are all directed to pressurized containers. *Getz* is entirely directed toward an aerated food product containing cream and having more than twice the volume of the material before aeration. See, *Getz*, column 1, lines 1-24. *Ciabatti* is entirely directed toward an a device for automatic dosing of foods having a

compressed air piston. See, *Ciabatti*, Abstract. *Scheindel* is entirely directed toward a pressurized container that dispenses a product loaded at a high temperature where it is highly flowable. See, *Scheindel*, Abstract. *Clauwert* is entirely directed toward an aerosol system for preparing spray foods that includes an aerosol can having two compartments. See, *Clauwert*, Abstract. *Schultz* is entirely directed to a pressurized container for viscous foods having a gas in one chamber of the container for dispensing the product from a second chamber. See, *Schultz*, column 2, lines 13-50. *Cornelius* is entirely directed to a process in which a source of concentrated orange juice is metered and combined with water under pressure in a refrigerated blending and storage device along with nitrous oxide gas prior to dispensation. See, *Cornelius*, Abstract.

Applicants submit that since so many of these references teach away from each other, the skilled artisan would have no reason to combine the cited references to arrive at the present claims. For example, both *Rivier* and *Smader* teach that gas is not necessary for expansion of a product. In contrast, at least *Clauwert* discloses the use of a blowing agent to prepare an aerosol product. Further, while at least *Clauwert* and *Scheindel* disclose the use of a propellant gas, *Morely* discloses the use of hand pressure to expel the product, *Smader* discloses the use of a compressed liquid refrigerant as a propellant, and *Getz* requires vigorous agitation of the container to build pressure to expel the product. Applicants submit that even more such examples are possible with respect to the present combination of references. Accordingly, a number of the cited references expressly teach away from combination with a number of other cited references. As such, the skilled artisan would have no reason to combine the cited references to arrive at the present claims.

Applicants also respectfully submit that the sheer number of references (11) cited by the Patent Office is evidence in and of itself that the invention is not obvious and most likely based solely on a hindsight reconstruction. As the Federal Circuit has noted, the requisite prior art suggestion to combine becomes less plausible when the necessary elements can only be found in a large number of references and "the extent to which such suggestion must be explicit in . . . the references, is decided on the facts of each case, in light of the prior art and its relationship to the applicant's invention." 2-5 Chisum on Patents §5.04 (*quoting In re Gorman*, 933 F.2d 982, 986-87; 18 U.S.P.Q.2d 1885, 1888 (Fed. Cir. 1991)). Moreover, the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be

analyzed in isolation. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995). One should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075. (Fed. Cir. 1988). As such, Applicants respectfully submit that the skilled artisan would have no reason to combine the cited references to arrive at the present claims.

Indeed, Applicants respectfully assert that the fact that the Patent Office was forced to use eleven (11) references, the references relating to non-analogous art and each reference having a different intended use, provides support that the Patent Office is picking and choosing portions of the applied references to selectively piece together teachings of each of the references in an attempt to recreate what the claimed invention discloses.

Applicants further submit that, to the extent that each cited reference was discussed individually, the discussion of the references was not to address the issue of novelty under 35 U.S.C. §102, but rather to illustrate, in part, the differences between the individual references and reasons why the cited references cannot be properly combined. Applicants respectfully submit that it is the rejection itself that forced Applicants to respond in such a manner.

In sum, Applicants respectfully submit that the Patent Office is picking and choosing selected portions of the cited references to arrive at the present claims. However, when the references are properly considered as a whole, there exists no reason why the skilled artisan would combine the cited references to achieve the claimed invention. For at least the reasons discussed above, Applicants respectfully submit that the Patent Office has failed to establish a prima facie case of obviousness.

Accordingly, Applicants respectfully request that the rejection of Claims 1-4, 9, 12 and 14-16 under 35 U.S.C. §103(a) be reconsidered and withdrawn.

In the Office Action, Claims 5 and 7 are rejected under 35 U.S.C. §103(a) as being unpatentable over the references as applied to Claims 1-4, 9, 12 and 14-16 above, and in further view of EP 0136104 to Scheindel ("*Scheindel*") and U.S. Patent No. 3,710,538 to Lowy et al. ("*Lowy*"); Claim 6 is rejected under 35 U.S.C. §103(a) as being unpatentable over the references as applied to Claims 1-4, 9, 12 and 14-16 above, and in further view of U.S. Patent No. 4,967,931 to DeVries ("*DeVries*") as further evidenced by "Ice Cream and Frozen Desserts" to Stogo ("*Stogo*"); Claim 8 is rejected under 35 U.S.C. §103(a) as being unpatentable over the

references as applied to Claims 1-4, 9, 12 and 14-16 above, and in further view of U.S. Patent No. 5,277,336 to Youel ("*Youel*"), U.S. Patent No. 5,799,469 to Obrist ("*Obrist*"), EP 1013566 to Mekata ("*Mekata*"), and U.S. Patent No. 3,225,967 to Heimgartner ("*Heimgartner*"); Claim 11 is rejected under 35 U.S.C. §103(a) as being unpatentable over the references as applied to Claims 1-4, 9, 12 and 14-16 above, and in further view of *Scheindel*, *Obrist*, and *Youel*; Claim 13 is rejected under 35 U.S.C. §103(a) as being unpatentable over the references as applied to Claims 1-4, 9, 12 and 14-16 above, and in further view of GB 1232929 to E.I. Du Pont de Nemours and Co. ("*Du Pont*") and U.S. Patent No. 4,659,575 to Fiedler ("*Fiedler*"). Applicants respectfully submit that the patentability of independent Claim 1 as previously discussed renders moot the obviousness rejection of Claims 5-8, 10-11, and 13 that depend from Claim 1. In this regard, the cited art fails to teach or suggest the elements of Claims 5-8, 10-11, and 13 in combination with the novel elements of Claim 1.

Additionally, as discussed above, Applicants also respectfully submit that the sheer number of references cited by the Patent Office against the pending dependent claims is evidence in and of itself that the invention is not obvious and most likely based solely on a hindsight reconstruction. Indeed, for each dependent claim rejection, the Patent Office uses at least 13 references, and as many as 15 references to attempt to render the present claims obvious.

Applicants also respectfully request that the Patent Office carefully reconsider the integrity of the present rejections. Applicants note that, in the previous rejection, Claim 8 was rejected in view of *Riviere*, *Smadar*, *Getz*, *Morley*, *Ciabatti*, *Clauwert*, U.S. Patent No. 6,880,732 to Scheindel ("*Scheindel*"), *Schultz*, *Hall*, *Destephano*, *Cox*, *Youel*, *Obrist*, *Mekata*, *Heimgartner* and FR Patent No. 2,829,748 to *Riviere* ("*Riviere II*"). Upon submission of the certified copy of the English translation of the priority document, the Patent Office simply removed *Scheindel* and *Riviere II* as prior art references, but maintained the rejection. Accordingly, it appears that the Patent Office did not find *Scheindel* and *Riviere II* germane to the previous rejection or, alternatively, the Patent Office is erroneously rejecting Claim 8 in the pending final Office Action. For at least the above-mentioned reasons, Applicants respectfully request that the Patent Office reconsider the present rejections.

Accordingly, Applicants respectfully request that the rejections of Claims 5-8, 10-11 and 13 be reconsidered and withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same. In the event there remains any impediment to allowance of the claims that could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

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